The following pages are reproduced from the Brief for the United States filed by Solicitor General Cox in *United States* v. *Seeger*, No. 50, October Term, 1964.

CITATIONS

Cases:

Miscellaneous:

Miscellaneous—Continued

ARGUMENT

Introductory.—This case involves the constitutionality of Section 6(j) of the Universal Military Training and Service Act. That provision exempts from combatant service and training any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Such persons remain subject to the draft but are assigned to non-combatant service or, if their religious beliefs require, to forms of national service outside the armed forces.

Section 6(j) defines "religious training and belief" as:

> belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

The net effect is to exempt from combatant service or training but to subject to the universal obligation of assigned national service those persons whose conscientious opposition to war in any form is based upon belief in a relation to a Supreme Being imposing duties superior to all human relationships.

Although it is possible to read Section 6(j) as referring only to the iron commands of a fundamentalist God, transmitted by unquestionable divine revelation, we think that the test is considerably more liberal. In our view, which is explained at more length below (pp. 72–73) and in our brief in *United States* v. *Jakobson,* No. 51, this Term, Congress did not require belief in any particular kind of God,

and religious beliefs like those of such modern Protestant theologians as Professor Tillich and Dr. Robinson would satisfy the statutory requirement of "belief in a relation to a Supreme Being." The essence of the statutory standard lies in the contrast between duties resulting from man's relationship to his fellow men and superior obligations owed to a God or ideal fairly characterized as divine.[3]

However broadly the words of Section 6(j) are construed respondent Seeger does not qualify for the statutory exemption. His views are "a purely ethical creed." He based his refusal to participate in military training entirely upon his judgment concerning the effect war has upon men and human affairs (R. 73). He derives his opposition to war, sincere as his conviction may be, not from religious teaching but from essentially political, sociological, or philosophical views. He is not responding to an obligation superior, in his conscience, to all human obligations; he is obeying a personal moral code based, according to his own statement, upon "how he feels towards his fellow man" (R. 5). Seeger's thoughtfulness and his steadfastness in pursuing what he deems right may command respect, but his views do not constitute the kind of belief in a divine obligation that Congress chose to exempt.

Since Seeger does not qualify for the statutory exemption, he is forced to attack its constitutionality

[3] We use the adjective "divine" to denote not merely something "of or pertaining to God or a god" but also "more than human, excellent in a superhuman degree." *Shorter Oxford English Dictionary* (Oxford 1936).

and argue that since the government chose to exempt those whose opposition to war is based upon belief in a duty rising above all human obligations, the government must also exempt those whose conscientious opposition is based upon ethical convictions derived from political, social, or moral philosophy, or some combination of the three. The court of appeals accepted this view upon the ground that the Fifth Amendment, read with the First, requires Congress to treat alike all those whose opposition to war is based upon "a pervading commitment to a moral ideal" (R. 36).

The decision of the court of appeals is plainly inconsistent with the unanimous decisions of this Court in the *Selective Draft Law Cases*, 245 U.S. 366, 389–390, *Goldman* v. *United States*, 245 U.S. 474, *Kramer* v. *United States*, 245 U.S. 478, and *Ruthenberg* v. *United States*, 245 U.S. 480; indeed every court which has considered the question, including the court below, has upheld the constitutionality of Section 6(j). *United States* v. *Bendik*, 220 F. 2d 249 (C.A. 2);[4] *United States* v. *Delime*, 223 F. 2d 96 (C.A. 3); *George* v. *United States*, 196 F. 2d 445 (C.A. 9), certiorari denied, 344 U.S. 843; *Clark* v. *United States*, 236 F. 2d 13 (C.A. 9), certiorari denied, 352 U.S. 882; *Etcheverry* v. *United States*, 320 F. 2d 873 (C.A. 9), cer-

[4] The court below purported to distinguish its earlier decision in *Bendik* on the ground that there the court had not considered whether Section 6(j) distinguished among religious groups.

tiorari denied, 375 U.S. 930; *Peter* v. *United States*, 324 F. 2d 173 (C.A. 9), pending on writ of certiorari, No. 29, this Term.

Two kinds of attack are leveled at the constitutionality of Section 6(j). One denies the power of Congress to exempt from combatant training and service that class of persons who oppose participation in war upon "religious" grounds, without exempting other objectors. The argument assumes that the definition of "religion" in Section 6(j) is unexceptionable and that the statute draws no improper distinction between different religions. See Kurland, *Religion and the Law* (1962) 37–38. The second line of attack is that approved by the court of appeals. It challenges the particular line of distinction drawn in Section 6(j), not as aid to religion violating the First Amendment, but as an unreasonable classification because, as the court defines "religion," "a line such as is drawn by the 'Supreme Being' requirement between different forms of religious expression cannot be permitted to stand consistently with the due process clause of the Fifth Amendment" (R. 38).

We deal separately with the two lines of analysis.

I

THE FIRST AMENDMENT PERMITS CONGRESS TO ACCOMMODATE THE FREE EXERCISE OF RELIGION WITH THE NEEDS OF NATIONAL DEFENSE BY ASSIGNING TO NONCOMBATANT SERVICE OR NATIONAL SERVICE OUTSIDE THE ARMED FORCES PERSONS WHO, BY REASON OF BELIEF IN A DIVINE OBLIGATION, ARE OPPOSED TO PARTICIPATION IN WAR IN ANY FORM

The cornerstone of any system of universal military service and training must be equality of obligation to the Nation. Those who are rendering more essential service in a civilian capacity may be deferred without violating that principle because they are fulfilling the obligation. A few compassionate exceptions, just in the eyes of the community, may also be acceptable. But the principle of equality of obligation, save in exceptional instances, is essential to an effective selective service law.

To impose an obligation to participate in combatant training and service upon a person whose religious beliefs forbid him to participate in war in any form interferes in a substantial sense with religious liberty.[5] He is ordered to disobey what to him is a divine obligation superior to mere duties among men and if he disobeys, as he will, he is punished for obeying the religious duty. Section 6(j) attempts to accommodate the principle of equality of patriotic obligation with religious liberty by assigning the religious objector to noncombatant service or, if that too be inconsistent with his religious scruples, by assigning him to other national service.

We consider later the question whether Congress has drawn a permissible line in attempting to accom-

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[5] In arguing, as we do, that Congress may properly seek to avoid such interference, we intend no implication that Congress is constitutionally required to grant any exemption at all. This Court has stated the contrary. See *United States* v. *Macintosh*, 283 U.S. 605, 623–624 (dictum), overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61. See also *Hamilton* v. *Regents of the University of California*, 293 U.S. 245, 265–268 (concurring opinion of Mr. Justice Cardozo).

modate recognition of the claims of religious liberty with the needs of national defense. The fundamental question at the threshold, however, is whether that accommodation is a permissible objective under the First Amendment.

The power of Congress to make such an accommodation is squarely sustained by prior decisions. In the *Selective Draft Law Cases*, 245 U.S. 366, the Court upheld the Selective Draft Law of 1917, which included an exemption for persons who were members of religious sects opposed to war in any form, provided their own religious convictions were the same. The Court unanimously[4] held that (*id.* at 389–390):

> [W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clause of the act * * * because we think its unsoundness is too apparent to require us to do more.

The argument rejected was that Congress could not constitutionally favor religion as a whole, nor favor religious men who belonged to particular sects over other religious men.[5]

A week later, the Court reaffirmed this determination in *Goldman* v. *United States*, 245 U.S. 474,

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[4] The opinion was written by Chief Justice White. The remainder of the Court consisted of Justices McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, and Clarke.

[5] See Brief on Behalf of the Plaintiffs-in-Error in No. 702, Oct. Term 1917, pp. 33–40, adopted by reference in Brief on Behalf of the Plaintiffs-in-Error in No. 681, Oct. Term 1917, p. 9. See also Brief for the United States in Nos. 656, 663, 664, 665, 666, 680, 681, 702, 738, pp. 82–83.

Kramer v. *United States,* 245 U.S. 478, and *Ruthenberg* v. *United States,* 245 U.S. 480, by merely citing the *Selective Draft Law Cases.* In *Goldman* and *Kramer,* the argument advanced was the same as in the earlier case.[8] In *Ruthenberg,* the exemption was held constitutional over the claims that it violated freedom of religion (1) to allow an exemption to objectors who opposed war and belonged to a sect which opposed all war, but not to religious objectors who did not belong to such a sect; and (2) to give an exception to objectors who based their position on religious conviction, but not to those whose views came from within themselves.[9] Accord, *Yanyar* v. *United States,* 246 U.S. 649;[10] *Stephens* v. *United States,* 247 U.S. 504.[11]

Thus, the Court had presented to it the exact question involved in this case—whether granting an exemption to persons who will not participate in war because of religious convictions, while failing to grant one to non-religious conscientious objectors violates the First Amendment. Indeed, if anything, the issue in the earlier cases was presented in a more difficult context since the World War I statute restricted the exemption to members of religious sects and made no provision for the unaffiliated believer. Nevertheless, the Court rejected the contention as frivolous.

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[8] See Brief on Behalf of the Plaintiffs-in-Error in No. 702, Oct. Term 1917, pp. 33–40, adopted by reference in Brief on Behalf of the Plaintiffs-in-Error in No. 680, Oct. Term 1917, p. 9.

[9] See Brief for Ruthenberg, et al. in No. 656, Oct. Term 1917, pp. 1–9.

[10] See Motion by the United States to Dismiss or Affirm, Nos. 767, 768, Oct. Term 1917, p. 3.

[11] See Brief of Plaintiff-in-Error Contra Motion to Dismiss or Affirm, No. 813, Oct. Term 1917, pp. 2–5.

On principle the earlier decisions are correct. An exemption for religious conscientious objectors does not constitute an establishment of religion, nor does it grant forbidden preferences to the religious or impose disabilities upon non-religious men. Plainly, the exemption does not interfere with, much less prohibit, the full freedom of non-religious objectors to refuse to believe in or practice religion. They are not subjected to invidious discrimination or disqualification. The sole effect upon them is that they, like millions of others, do not receive an exemption available to religious objectors. The question narrows, therefore, to whether Congress, by such an exemption, grants a preference for religion in violation of the purposes of the First Amendment. Cf. *Everson* v. *Board of Education*, 330 U.S. 1, 15–16.[12]

There is no basis for an argument that since the exemption runs only to persons who believe in a Su-

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[12] It is significant that Leo Pfeffer, an exponent of a broad interpretation of the establishment clause, believes that the exemption for religious conscientious objectors is constitutional. Pfeffer, *Church, State, and Freedom* (1953) 509–510.

Numerous other books and law reviews have commented on this issue. Those supporting the constitutionality of Section 6(j) include: Katz, *Religion and American Constitutions* (1964) 20–21; Drinan, *Religions, the Courts and Public Policy* (1963) 15–20. Other articles assume constitutionality. Waite, *Section 5(g) of the Selective Service Act, as Amended by the Court*, 29 Minn. L. Rev. 22 (1944); Russell, *Conscientious Objector Recognition*, 20 Geo. Wash. L. Rev. 409 (1952). As to books and articles taking the position that the statute is unconstitutional, see Kurland, *Religion and the Law* (1962) 37–38; Donnici, *Government Encouragement of Religious Ideology*, 13 J. of Pub. L. 16 (1964); Conklin, *Conscientious Objector Provision*, 51 Geo. L. J. 252 (1963) (criticizing *Torcaso* v. *Watkins*, 367 U.S. 488, but saying that, if that decision is followed, Section 6(j) is invalid); Freeman, *Exemptions from Civil Responsibility*, 20 Ohio St. L. J. 437 (1959).

preme Being it might conceivably influence persons to become religious. It is scarcely conceivable that anyone would adopt or change his religion in an effort to be assigned, as a conscientious objector, to some non-combatant form of service; if the facts became known, such a man could not qualify for the exemption. Moreover, persons such as respondent are by definition so unyielding in moral opposition to war that they are willing to suffer imprisonment rather than bear arms. Surely, they would not be likely to change their views of religion so lightly; if they would, there is no good reason to credit their convictions as to war. In every substantial sense Section 6(j) takes men as it finds them and calls upon them for that form of national service that does the least violence to their religious beliefs.

The wall between church and state erected by the establishment clause does not require the government to ignore religious beliefs in the framing of legislation dealing for secular purposes with conduct conforming, in some instances, to the dictates of religion. The aim of the exemption, as we have seen, is to alleviate the harshness which would result if individuals were compelled to flout the commands of their religion in order to obey those of the State. For the State to avoid such an intrusion upon freedom of religion is an effort to remain neutral—to avoid the penalization of religion, rather than to prefer it.[13]

[13] In *Torcaso* v. *Watkins*, 367 U.S. 488, a disability was imposed upon a non-believer *for his views*. That, of course, is quite another matter. *Torcaso* obviously does not mean that a non-believer is exempt from the obligations which fall upon citizens generally because his convictions are inconsistent with the laws which impose them. His amenability to such regulation does not raise a First Amendment issue.

A significant number of recent decisions of this Court recognize, and even require, that such accommodations be made in order to minimize conflict between religious belief and governmental regulation. *Girouard* v. *United States*, 328 U.S. 61, held that Congress had not barred from citizenship an alien who refused, for religious reasons, to swear that he is willing to bear arms. It is not entirely clear from the opinion whether the Court held (1) that Congress had not authorized a requirement of willingness to bear arms as a condition of citizenship; or (2) that Congress authorized the imposition of such a requirement but did not intend it to apply to religious conscientious objectors. The latter, however, appears to be the correct interpretation since the Court repeatedly referred to freedom of religion. For example, it stated (*id.* at 68):

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

It is of course implicit in that statement that such accommodations of religious liberty do not violate the establishment clause.

In *Everson* v. *Board of Education, supra*, the Court again recognized the power of government to accommodate religion in order to avoid interference with freedom of religion, declaring (330 U.S. at 18):

> Of course, cutting off church schools from [various municipal services such as police and fire protection], so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

The Court then upheld the payment of bus fares to children attending parochial, as well as public, schools.[14]

Subsequently, in *Zorach* v. *Clauson*, 343 U.S. 306, the Court sustained a public school program releasing children to attend religious instruction in their own places of worship. There, the Court said (*id.* at 313–314):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee

[14] In his dissenting opinion, in which he said that such State aid to religion was unconstitutional, Mr. Justice Rutledge stated that "the only serious surviving threat" to the separation of church and state required by the First Amendment was "through use of the taxing power to support religion." 330 U.S. at 44.

> the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. * * * When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. * * * The government must be neutral when it comes to competition between sects. It may not trust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.

As examples, the Court pointed to excuses from school for religious observances such as Catholic Days of Obligation, Yom Kippur, or baptisms. The Court distinguished *McCollum* v. *Board of Education,* 333 U.S. 203, where it had held unconstitutional a program of religious instruction in the public schools, on the ground that "released time" outside the schools was merely an accommodation of religion. The Court nowhere suggested that non-religious parents had the right to have their children released for non-religious purposes; indeed, the released-time program before the Court clearly did not allow for this. 343 U.S. at 308–309, note 1. Thus, the Court upheld an accommodation of religion even though no equivalent ex-

emption from attendance was extended to non-religious persons.

In the Sunday Blue Law cases (*McGowan* v. *Maryland*, 366 U.S. 420, *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, *Braunfeld* v. *Brown*, 366 U.S. 599, and *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617), this Court upheld the statutes on the ground that they had a secular, not a religious, purpose. However, Mr. Justice Brennan, in his concurring and dissenting opinion in *Braunfeld*, concluded that the free exercise clause prevented Orthodox Jews from being required to close their businesses on Sunday since their religion prescribed that they be closed on Saturday and two days' closing would cause them serious economic injury. In doing so, he rejected the claim that such an exemption from the blue laws for persons of one religion would constitute an establishment (366 U.S. at 615):

> Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was rejected with the observation that "its unsoundness is too apparent to require" discussion. *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918). However widespread the complaint, it is legally baseless * * *.

Thus, Mr. Justice Brennan relied on the decision of this Court upholding the predecessor to the exemption

provision involved in this case to demonstrate that the government, in the interest of religious freedom, may, and indeed in some instances *must*, make a special accommodation to religious belief.[15]

The plurality opinion of the Chief Justice disagreed with Mr. Justice Brennan's view and stated that the States were not required by the free exercise clause to grant Orthodox Jews an exemption from the blue laws. 366 U.S. at 608–609. However, it never suggested that, if an exemption were granted—as 21 of the 34 States which had Sunday blue laws in fact did (see 366 U.S. at 614, note 1)—it would be unconstitutional under the establishment clause. Quite the contrary, the Court indicated that "this may well be the wise solution to the problem." *Id.* at 608.

Mr. Justice Frankfurter, joined by Mr. Justice Harlan, similarly rejected the contention of the Orthodox Jews on the ground that "[t]heir 'establishment' contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear." 366 U.S. at 468. He then cited the *Selective Draft Law Cases* which held that the World War I version of Section 6(j) did not violate the First Amendment. And finally he stated that "[h]owever preferable, personally, one might deem

[15] Mr. Justice Stewart in his dissenting opinion, said that he agreed "with substantially all" of Mr. Justice Brennan's opinion. 366 U.S. at 616. For these same reasons, Justices Brennan and Stewart dissented in *Gallagher* v. *Crown Kosher Super Market*, *supra*, 366 U.S. at 642.

such an exception [for those who observed the Saturday Sabbath]," he could not "find that the Constitution compels it" since several considerations provided reasonable justification for the legislature's refusal to adopt it. 366 U.S. at 520. Thus, all of the Justices who commented on the issue [16] agreed that an exemption from the blue laws limited to persons who, because of religious belief, were required to close their businesses on Saturday would not violate the First Amendment.[17]

In his concuring opinion in *Abington School District* v. *Schempp,* 374 U.S. 203, 295, which held that the Bible may not be read and the Lord's Prayer may not be recited as part of the public school curriculum, Mr. Justice Brennan again referred to the interrelationship of the free exercise and establishment clause:

> Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for one society. Likewise nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the framers would never have understood that such a construction

[16] Mr. Justice Douglas, in dissenting, did not reach the issue of a special exemption for Sabbatarians since in his view any requirement that businesses close on Sunday violated the free exercise and establishment clauses. See 366 U.S. at 577–578.

[17] It has recently been proposed that Congress grant to Amish Mennonites an optional exemption from the social security self-employment tax. See Cong. Rec., September 2, 1964 (daily ed.), pp. 20699–20702.

> sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.[18]

Similarly, Mr. Justice Goldberg, joined by Mr. Justice Harlan, stated in a concurring opinion (374 U.S. at 306):

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require it to do so. * * * [T]he required and the permissible accommodations between state and church frame the relation as one free from hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other.

And Mr. Justice Stewart in his dissenting opinion emphasized the necessity of avoiding use of the establishment clause so as to interfere with the free exercise of religion, which is also guaranteed by the First Amendment. *Id.* at 308–320.

Finally, in *Sherbert* v. *Verner*, 374 U.S. 398, this Court held that a State may not deny unemployment compensation benefits to a person who will not work Saturdays because of her religious beliefs, on the ground that she refused employment which required

[18] The majority opinion did not consider this point.

such work. This holding was based on the free exercise clause of the First Amendment and therefore did not apply to persons of religious faiths who were not forbidden to work on Saturdays or to the non-religious. The Court explicitly rejected the argument that this holding itself constituted an establishment of religion on the ground that it "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Id.* at 409. Mr. Justice Stewart, concurring in the result, agreed that the State was required by the free exercise clause to treat a person differently when her refusal to work is based on religious convictions than when it is grounded on other reasons and that this did not violate the establishment clause. *Id.* at 413–417. Mr. Justice Harlan, joined by Mr. Justice White, dissented on the ground that the free exercise clause did not require the State to make an exception for persons who refused to work because of religious conviction. The opinion went on, however, to say (*id.* at 422–423);

> [I]t would be a permissible accommodation of religion for the State if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" * * * is not so narrow a channel that the slightest deviation from an aboslutely straight course

> leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. * * *[T]here is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

Thus, the Court was unanimous on the proposition that, whether or not in a particular situation the State is constitutionally required to do so, it may give an exemption limited to religious persons in order to avoid interference with full freedom of religion.

As we have seen, the decisions of this Court establish that the State and federal governments have considerable discretion in accommodating religion. This power is particularly clear when the legislation is attempting to avoid interference with religious freedom. Indeed, in *Sherbert* v. *Verner*, this Court held that a State was *compelled* by the free exercise clause to provide an exemption for persons of particular religious views even though no exemption was necessary for anyone else. Surely, Congress has equal power to decide to accommodate persons whose religious convictions forbid participation in war.[19]

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[19] That, of course, was the express holding of the *Selective Draft Law Cases*, discussed at pp. 21–22 above.

II

THE DEFINITION OF THE CLASS EXEMPTED FROM COMBATANT SERVICE AND TRAINING BY SECTION 6(j) IS A PERMISSIBLE CLASSIFICATION REASONABLY ACCOMMODATING THE NEEDS OF NATIONAL DEFENSE WITH THE INTEREST IN RELIGIOUS LIBERTY SAFEGUARDED BY THE FIRST AMENDMENT

In judging the constitutionality of the classification which Congress established by Section 6(j) it is essential to keep in full perspective the legislative problem of defining any exemption for conscientious objectors. For the question here is not whether concern for the rights of the individual citizen, as opposed to the collective mass of society, should lead to a policy of exempting all persons who can be said to have conscientious scruples against military service, or whether a personal moral code is as "good" or as "worthy of respect" as a religious conviction based upon belief in a divine obligation. The framing of a draft law involves legislative judgments that the courts may not supersede unless the legislature exceeds its function. Assuming that Congress may constitutionally seek to accommodate the free exercise of religion with the needs of national defense, as we have contended, by assigning religious objectors to war in any form to noncombatant service, then the only remaining justiciable question is whether Congress acted arbitrarily or capriciously, or engaged in invidious discrimination.

The heart of the legislative problem in exempting conscientious objectors has always been to draw a

fair line defining the limits of the exemption in what now seems to us to be a continuum of beliefs ranging from the revealed commands of a fundamentalist God through modern Protestant theology to moral philosophy and ultimately to political judgments based upon the very considerations that must be weighed by the President and Congress in declaring war, raising armies, and appropriating money for the national defense. Nor can the problem be abstracted from its historical evolution among the traditions and fundamental beliefs of the American people.

The polar cases are easy to deal with. The core of the exemption for conscientious objectors is the unwillingness of the Congress, speaking the true will of the American people, to punish as a criminal a man who refuses to perform military service in obedience to what he believes is the command of a God transmitted by divine revelation. The unwillingness of the American people to compel a man to disobey a divine command and yield to a human obligation imposed by government is older than the Nation.[20]

Quite different is the situation of the individual who disavows all religious beliefs (however broadly "religious" be defined) but who studies the contemporary human scene and decides on the basis of political, sociological, and economic considerations that a particular war is wrong, or that all wars are wrong, as a matter of human relations. However firm the

[20] See pp. 41–72 below.

conviction and unalterable the determination not to support the wrong, it is then a human judgment based upon the same materials as the government must canvass in reaching its decision. No State has ever permitted individual citizens to set their political judgments of how to conduct human affairs over the judgment of the community. Respondent's views appear to differ somewhat from this polar position, and we take it that no one is seriously contending that the Constitution requires extending the exemption to anyone with a sincerely held political or social objection to war in any form.

Between the polar cases lies a vast middle ground where the lines between different beliefs and opinions are subtle, wavering, and uncertain. Should one distinguish between him whose religion is purely faith in an unquestionable command of God revealed in the Scripture and his co-religionist of the same creed who reached his convictions solely through the path of logic? Rigid adherence to some definitions of religion would seem logically to exclude those who state that they pray to a Christian God solely because logical analysis demonstrates His existence. For one of the central points in some definitions of religion is that it deals with beliefs lying beyond what can be observed by the senses or demonstrated by logical analysis. Judge Augustus N. Hand evidently had this in mind when he wrote in *United States* v. *Kauten*, 133 F. 2d 703, 708:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his uni-

> verse—a sense common to men in most primitive and in most highly civilized societies. It accepts the aid of logic but refuses to be limited by it.

Yet to make that the sole test is open to the objection that it excludes from the category of religious many men who are active communicants in established religious sects.

Similarly, there is a marked difference, from some viewpoints, between the fundamentalist who believes in a personal God up in heaven and the modern Protestant theologian, such as Professor Tillich [21] or Dr. Robinson,[22] who conceive God as the ultimate ground or depth of our being, while, from other viewpoints the differences are immaterial and any space between is occupied by shadings of opinion in which the differences of degree are often scarcely distinguishable.

To move quickly to the other end of the total range, we suggest that there is also no universally acceptable, clear-cut line of distinction between an ethical or moral code, unrelated to religion, and political or social convictions. There have been employers who firmly believed that it was "wrong" to sign a union shop contract because no man should be compelled to join a labor union, and some employers were prepared to sacrifice business advantage to that conviction. Probably none would have claimed religious sanction for their views but a number could sincerely claim that

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[21] II Tillich, *Systematic Theology* (1957) 9.

[22] Robinson, *Honest to God* (1963) 45–63.

they acted out of conscience. Here again, however, the line between "conscience" and social or political opinion is only a difference in degree. The problem is no different in separating moral from political objections to war in any form.

We may note parenthetically that there are also practical objections to any exemption of the breadth which respondent urges. It is, to begin with, a rather difficult task to determine when a religious objection is sincerely held. See Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity,* 19 U. of Pitts. L. Rev. 695. This task would become immeasurably more complicated and difficult if the administrators of the system were called upon to determine whether one seeking an exemption sincerely holds to a moral or ethical creed or code opposed to war. *Id.* at 711. Professor Field, an English student of the problem who has had long experience with the British system, has observed; Field, *Pacifism and Conscientious Objection* (Cambridge University Press, 1945) 4:

> It will be seen, then, that Pacifism or Conscientious Objection is not one single simple creed, but a number of creeds, based on widely different and sometimes diametrically opposed general principles. This obviously makes the task of critical evaluation particularly difficult. Indeed, it would not be too much to say that criticism of Pacifism is impossible; there can only be criticism of various pacifist arguments, some of which have little or no connection and may, indeed, be in contradiction with one another.

We do not urge that difficulties of this kind constitute an insuperable objection to a law granting broader exemptions than those presently provided. We make only the point that the difficulties are surely no less substantial than under the statutory test.

The difficulty in drawing any line is enhanced by the fact that the "importance" of any distinction in this area almost inescapably depends upon the subjective views of the observer. The fundamentalist, for example, sees little difference between the Protestant theologians exemplified by Professor Tillich and Dr. Robinson, on the one side, and the humanists like Julian Huxley, on the other,[23] but Mr. Huxley and Dr. Robinson see a world of difference.[24] Again, a devout believer in a Supreme Being might see no significant difference between a purely personal moral code condemning all forms of violence and purely political objections to war and the recruitment or training of armies in an age of nuclear bombs.

Despite the difficulty some line has to be drawn in the drafting and in the administration of a universal military service law, unless the polar cases are to be lumped together and a choice made either to deny exemption to all conscientious objectors or else to allow any individual to avoid combatant service if his sincere political convictions make him opposed to war in any form. Perhaps a line could have been drawn which distinguished moral philosophy from political economy. Possibly the test might be framed

[23] See Huxley, *Religion Without Revelation* (1927); Huxley, *Essays of a Humanist* (1964).

[24] See *id* at 218–222; Robinson, *Honest to God*, *supra*, pp. 127–129.

in terms of conscience as opposed to political, economic, or sociological opinion. The line was drawn, by the body to which the responsibility for raising armies was confided, in terms of the difference between human and divine obligations. It is not ground for invalidating the statute that a court concludes, even rightly, that the line might better be drawn at another point. Nor is it material that the distinction between two borderline cases, when they are viewed in isolation, may seem hardly more than fiat. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Holmes, J., dissenting in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41. The Act does not offend the Fifth Amendment unless it is shown that Congress acted arbitrarily and capriciously or engaged in invidious discrimination.

We submit that the case is just the contrary—that the definition of the class exempted from combatant service by Section 6(j) plainly appears, when the foregoing problems are kept in mind, to be a reasonable method of accommodating the interest in religious liberty with the needs of national defense. That conclusion, we submit, is confirmed by four further considerations.

A. THE HISTORICAL EVOLUTION OF THE DEFINITION OF A RELIGIOUS OBJECTION TO PARTICIPATION IN WAR IN ANY FORM SHOWS THAT IT IS NEITHER ARBITRARY NOR INVIDIOUS

Section 6(j) is the culmination of years of experience. The practice of exempting from military service "conscientious objectors" opposed to war in any form is as old, in the United States, as military conscription. The scope of the exemption has changed from time to time but, with one exception not authorized by Congress, it has always been limited to those whose opposition was based upon religious belief.

1. Pre-Civil War

Until the Civil War, when both the federal government and the Confederacy adopted national conscription, the only compulsory military service in this country was in the muster of the State militia. Conscripted militia service was employed in the various colonies to provide defense against Indian attack. Conscientious objectors, during this early period, consisted principally of members of four historic "peace churches" who were among the earliest immigrants to the North American continent: the Religious Society of Friends, or Quakers; the Church of the Brethren, whose members were sometimes called Dunkards; the Mennonite Church, which includes the Amish and the Hutterites; and the Moravians, or United Brethren. At first, members of those churches were sometimes imprisoned or subjected to heavy taxes or fines because of their refusal to render service, but on other occasions they were granted exemp-

tions. *Selective Service System Monograph No. 11, Conscientious Objection* (1950) 29.

Gradually, more and more of the State legislatures provided relief to persons whose religious convictions prohibited participation in war and permitted them to serve in noncombatant service. Of the original thirteen colonies, the first to provide relief were Massachusetts (1661), Rhode Island (1673), and Pennsylvania (1757).[25] *Monograph No. 11*,[26] p. 30; Selective Service Special Monograph No. 1, *Backgrounds of Selective Service* (1947), vol. II, part 6, p. 73; *id.* part 12, pp. 13–17; II Godcharles, *Pennsylvania, Political, Governmental, Military* (1933) 4.

In granting the exemptions, the State legislatures were aware of two facts. The first was that pacificism was an essential part of the tenets of the "peace churches," based upon a literal reading of the Bible. Thus, in 1775, the Quakers, in voicing their opposition to a proposal in the Pennsylvania House of Representatives that the exemption for religious scruple be modified, stated that their religious principles were "founded on the Example and express Injunction of Christ our Lord and Lawgiver." *Monograph No. 11*, p. 35; *Pennsylvania Archives*, 8th series, vol. III (1935) 7326–7330. Similarly, the Annual Conference

[25] Before the State legislature acted, Parliament in 1749 exempted the Germans of Pennsylvania from participation in the Indian wars on the ground of religious scruples. Stokes and Pfeffer, *Church and State in the United States* (1964) 474.

[26] The first reference in this and similar succeeding citations is to the monograph. The second reference is to the citation given in the monograph.

of the Brethren, when asked in 1817 whether members could "go on the muster ground or not," replied that a member who did so "could not be in full fellowship with the church, for the Savior said to Peter, 'Put up thy sword into his place; for all they that take the sword, shall perish with the sword.'" *Monograph No. 11,* p. 39; Church of the Brethren, *Minutes of the Annual Meetings, 1778–1909* (Brethren Publishing House, 1909) 40–41.

Second, the early legislators were aware that under no circumstances, even to defend their lives and property, would practicing members of the peace churches take up arms. There were striking illustrations. In one instance, thirty Dunkards were massacred by Indians in less than forty-eight hours, but they nevertheless refused "a stirring appeal" from a lieutenant-colonel of militia to arm themselves for their own defense. In another instance, a Dunkard, in defense of his mill and his life, killed two Indians who were stragglers from a group which had massacred a Dunkard community; as a result of his action, he was excommunicated from his church and forced out of business by a boycott by his former co-religionists. *Monograph No. 11,* pp. 32–33; Jones, *History of the Early Settlement of the Juniata Valley* (Henry B. Ashmead, 1856) 208–209, 215–216.

It may be that the early exemptions from militia service did not reflect respect for religious scruples so much as recognition that any attempt to force the members of the peace churches to bear arms was doomed to fail. In any event, the exemptions were limited in scope, freeing the objector from the duty of

bearing arms but making no further accommodation to his pacifist principles. Thus, an early Pennsylvania statute (March 29, 1757), while it permitted members of the peace churches to appear at militia alarms without weapons, nevertheless required them to obey the commands of officers and perform generally helpful services, including "extinguishing fires" and "conveying intelligence as expresses or messengers." *Monograph No. 11*, p. 30; II Godcharles, *Pennsylvania, Political, Governmental, Military, supra*, p. 4. Later enactments coupled the exemption with a requirement that the person relieved supply a substitute or the money necessary to hire one (see the statutes cited in *Hamiton* v. *Regents of the University of California*, 293 U.S. 245, 266–267 (Mr. Justice Cardozo concurring)). This was done despite the contention of the peace churches that their creeds forbade the payment of a commutation fee as well as the rendering of personal military service. For example, during the Indian Wars, the Dunkards "refused in the most positive manner to pay a dollar to support those who were willing to take up arms to defend their homes and their firesides, until wrung from them by the stern mandates of the law, from which there was no appeal." *Monograph No. 11*, p. 32; Jones, *History of the Early Settlement of the Juniata Valley, supra*, pp. 208–209.

Similarly, despite the opposition of the Quakers that they "could not for Conscience Sake bear Arms, nor be concerned in warlike Preparations, either by personal Service or by paying any Fines, Penalties or Assessments, imposed in Consideration of our Ex-

emption from such Services," the Pennsylvania House of Representatives, in 1775, modified the pre-existing exemption to require all those who did not serve in the "military Association" of the Province "to contribute an Equivalent to the Time spent by the Associators in acquiring the military Discipline." *Monograph No. 11,* pp. 35–36; *Pennsylvania Archives, supra,* pp. 7351. The requirement is an interesting historical antecedent of the present practice of exempting religious objectors from combatant positions but assigning them to other forms of national service under the Selective Service Act. In a substantial sense both adapt the form of compulsory service to the beliefs of the objector instead of granting an exemption.

Although the concept of an exemption for religious objectors originally appears to have sprung primarily from practical considerations, by the onset of the Revolution it had gained acceptance on the basis of toleration of religious beliefs. Thus, in 1775 the Continental Congress adopted a resolution stating that it intended no violence to the consciences of those "who from Religious Principles cannot bear Arms in any case," but urging such people to make such "services to their oppressed country, which they can consistently with their Religious Principles." *Monograph No. 11,* pp. 33–34; X *Minutes of the Provincial Council of Pennsylvania from the Organization to the Termination of the Proprietary Government* (Theo. Fenn and Co., 1852) 293. In 1776, the Maryland Convention authorized the Committees of Observation to remit in whole or in part the fines as-

sessed by them for failure to enroll in the militia, and recommended that in doing so the Committees "make a difference between such persons as may refuse from religious principles, or other motives." *Monograph No. 11,* p. 37; *The American Archives,* 4th series, vol. VI (M. St. Clair Clark and Peter Force, 1846) 1504.

When the Bill of Rights first came under consideration in the House of Representatives, James Madison proposed that "no person religiously scrupulous shall be compelled to bear arms." I Annals of Congress 749. The chief argument for the proposal was offered by Representative Boudinot, who pointed out that those opposed to bearing arms on the basis of their religion "would rather die than use them" and "adverted to several instances of oppression on this point" that occurred during the Revolutionary War. *Id.* at 767. Representative Scott, on the other hand, opposed the provision because it might be construed as extending to those who were not religious (*ibid.*):

> There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.

Representative Gerry, who feared that the proposal in the form presented might vitiate the provision to which it was attached (what is now the Second Amend-

ment right of the people to keep and bear arms), wished to restrict the exemption to "persons belonging to a religious sect scrupulous of bearing arms." I Annals of Congress 750. Representative Benson opposed the provision because (*id.* at 751):

> No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.
>
> I have have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.

He therefore moved to strike the provision from the proposed amendment, but his motion failed by the narrow margin 24 to 22. *Ibid.* Representative Jackson proposed amending the provision by adding the words "upon paying an equivalent," and Representative Smith of South Carolina thought that those excused should be required to find a substitute. *Id.* at 750. Neither proposal was put to a vote, but the words "in person" were added to the clause prior to its being adopted by the House. *Id.* at 767.

The provision was not accepted by the Senate and never became part of the Constitution. There is no account of the Senate debate, and one can only specu-

late as to whether its rejection of the provision was based upon agreement with Representative Scott's view that the right to a non-religious exemption might thereby be established or agreement with Representative Benson's view that the matter should be left to legislative discretion. It clearly appears, however, from the arguments on the proposal, that to the extent that there was sentiment for making exemption for conscientious objection a constitutional right, it arose from a desire to accommodate only those who believed they were prevented from bearing arms by the requirements of their religion.

At the end of the War of 1812, while the outcome of peace negotiations was awaited, bills authorizing the President to call up the militia of the States and territories were passed by both the Senate and the House of Representatives (although no law was passed, since the Treaty of Ghent was received before the two houses could resolve their differences). Included in the House version was a section, proposed by Representative Lewis of Virginia and adopted, without debate "by a large majority," which provided (28 Annals of Congress 774–775):

> That every person who is a member of any religious sect or denomination of Christians,[27] conscientiously scrupulous of bearing arms, shall be exempted from the performance of the duties required by this act, by paying his due proportion of the amount contracted to be paid by the class in which he is concluded, according

[27] At that time, there were probably no non-Christian religions in the United States which were opposed as a matter of doctrine to all wars.

> to the provision of the fourth section of the act; or, in case there shall be a draught in such class, by paying to the person draughted such sum as shall be ascertained by the commanding officer of the company, so that the sum shall not exceed three months' pay; and the payment of such sum of money, in either case, shall be considered as entitling such person to an exemption from all the duties required by this act.

Representative Lewis stated that he offered the amendment because his own State of Virginia gave no exemption "on account of religious faith and conscientious scruples," and the practice had grown there of calling up non-resisters, court-martialing them when they refused to serve, assessing heavy fines, and then placing them in the next class and repeating the process, until they were reduced to ruin. 28 Annals of Congress 772–773. He stated that justice required an exemption for persons of religious scruple because (*id.* at 774):

> [A]s to personal service in arms, if any man conscientiously believed it was forbidden by the voice of God, no human tribunal had the right to force such a man to violate his religion and his conscience, and to stain his hands with human blood.

2. The Civil War

At the start of the Civil War, the draft was regulated by the States in both the North and the South. *Monograph No. 11,* p. 43. North Carolina provided in 1861 for an exemption for persons who have "religious scruples" against bearing arms, and Virginia provided in 1862 for such an exemption if "the tenets

of the church to which [the] applicant belonged" prohibited military service. *Monograph No. 11,* pp. 43–44; N.C. Public Laws, 2d Extra Sess. 1861, pp. 23–24; Acts of the General Assembly of Va. (1862), pp. 50–51.

The first federal conscription laws (as contrasted to laws providing for the calling up of the State militia) were enacted during the Civil War. The Confederacy did likewise. The original statutes enacted by both sides established a general exemption which could be obtained by furnishing a substitute or providing the money to hire one, but made no specific provision for exemptions for conscience. *Monograph No. 11,* pp. 41, 45. Within six months of its adoption of such a statute, however, the Confederate Congress extended an exemption by name to members of the "peace churches"—the Quakers, Dunkards, Nazarenes, and Mennonites—"in regular membership in their respective denominations" if a substitute was furnished or a tax of five hundred dollars paid into the public treasury. Public Laws of the Confederate States of America, 1st Cong., 2d Sess., ch. 45 (October 11, 1862).[28] Similarly, the federal statute was superseded by a statute which provided (13 Stat. 9):

> That members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered non-combatants, and shall be assigned by the

[28] The provisions of the First Amendment were adopted *in haec verba* by Article I, Section 9, Clause 12 of the Confederate Constitution.

> Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers: *Provided,* That no person shall be entitled to the benefit of the provisions of this section unless his declaration of conscientious scruples against bearing arms shall be supported by satisfactory evidence that his deportment has been uniformly consistent with such declaration.

Both Confederate and Union statutes continued the historic policy of exempting only those objectors whose membership in religious sects taught them that they were forbidden to bear arms by divine command. The legislative history of the federal statutes makes the point explicit. Thus, Congressman Garfield stated that he was "willing to exempt men who, from their religious creed, were absolutely prohibited from engaging in war" (63 Cong. Globe 576), and Senator Doolittle spoke against "compelling members of religious denominations by whose faith and creed it is regarded as a sin against God to bear arms even in self-defense, to go into the ranks to do military service" (*id.* at 208). Senator Wilson observed that Quakers, as a class, had proved their conscientious opposition to bearing arms "by more than one hundred years of profession and practice," and voiced approval for the proposal which he understood to grant exemptions to those "who belong to a religious denomination of which opposition to bearing arms is a part of the faith and creed." *Id.* at 206. Senator Saulsbury stated that he would not require Quakers to do

military duty "when they have been brought up from their early childhood in opposition to bearing arms" (*id.* at 204), and Senator Anthony noted that while the opinion of the Quakers on the subject of military participation "may seem very absurd * * * they are opinions that have been entertained for two hundred years by as intelligent men as have ever spoken the English language, and men have borne every persecution that the old martyrs ever bore in defense of these principles—educated, intelligent men; and I think we ought to respect them" (*id.* at 205). Senators Ten Eyck and Doolittle also took note of the persecution that Quakers had borne because of their refusal, on religious grounds, to do military service (*id.* at 205, 208), and Senator Lane stated that a Quaker could not be forced into the ranks of the Army, and that if he were "he would be worthless as a soldier" (*id.* at 206).

One exchange in particular underlines the fact that Congress intended that exemptions extend only to those who were directly forbidden by their religion to bear arms, and not to those who were pacifists for other reasons. Representative J. C. Allen offered an amendment extending the exemption to "any person who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms." In its support, he contended (63 Cong. Globe 576):

> It seems to me that we exonerate a class of individuals who are conscientiously opposed to bearing arms simply because they belong to a particular religious society whose articles of faith prohibit it, we ought to extend the exemp-

> tion so as to embrace all who have conscientious scruples on the subject. I cannot understand why it is that mere membership in a particular religious society should exempt a man because he happens to have conscientious scruples. It is not with the articles of faith of religious societies that we have to do, but with the conscience. The mere fact that a man has cast his lot with the Quakers, the Moravians, or the Dunkers ought not to exonerate him unless we exonerate those who have conscientious scruples against bearing arms who may belong to some other religious society, or to none whatever.

In reply, Representative Grinnel pointed out that the opposition of Quakers and other similar sects to bearing arms arose not from mere scruple, but from beliefs traditionally and tenaciously held (*ibid.*):

> If you examine the conscription bill enacted in the rebellious States, you will find that even there, having found the Quakers would not fight, they exempted them. Thus even the demons of rebellion do not now drag into their service the Quakers. In fact they could not. There is no power that could compel them effectively to bear arms. Their history shows that for more than two hundred years no nation has ever succeeded in bringing that denomination into the ranks as fighting men. Their religious conviction and zeal are stronger than the chains that would bind them or the dungeons that would confine them. * * * We should not at this day trifle with religious scruples and these men, who have laid the foundations of commonwealths in peace, whose children are reared in principles of peace, who have been always in favor of

> peace and opposed to bloodshed. We cannot put forth any claim to religious and Christian principles if we fail to respect the conscientious scruples of men who have no new-born creed; who have been firm and decided in their principles, and patriotic and just as citizens, ever since the nation has had an existence.

Representative Allen's amendment was thereupon rejected. *Ibid.* Thus it appears that the Civil War Congress rejected the concept that mere opposition to war, even though derived from noble principles, should be sufficient to constitute an excuse from military service. Congress deliberately chose to exempt only those belonging to sects which made non-participation in war a vital part of man's religious obligation.

The one departure which the Civil War statute made from most prior State enactments (as well as from that of the Confederacy) was to abandon the requirement that the exempted person procure a substitute or pay a commutation fee for use in the general military effort. Instead, the commutation fee was to be earmarked for the benefit of the sick and wounded, a purpose to which Quakers and other non-resisters did not object. Senator Harlan observed that it was the Quakers' belief that "[w]e might as well bear arms as hire a man to bear arms in our stead" (63 Cong. Globe 205), and Senator Lane noted that, as a practical matter, it cost the government ten times as much as it received when it tried to collect money from Quakers in lieu of military service (*id.* at 206).

3. World War I

The Selective Draft Law of 1917 abandoned any requirement for the payment of a commutation fee, but otherwise adopted the approach followed in prior legislation. The statute provided (40 Stat. 78):

> [N]othing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant * * *.

Senator Thomas offered an amendment which would have deleted the requirement of membership in a "well-recognized religious sect or organization," thereby extending the exemption to "any person who is conscientiously opposed to engaging in such service." 55 Cong. Rec. 1478. He explained (*id.* at 1473):

> I want * * * to emphasize what seems to be one of the gravest injustices of this exemption section. I refer to that part of it which is designed to exempt from the operations of the bill those who have conscientious scruples against

> war, and then confining the exemption to those who, having such scruples, are members of denominations of which that is one of their articles of faith. * * *
>
> I am unable to perceive, Mr. President, how and by what process of reasoning a man who is conscientiously opposed to war and not a member of a religious denomination must submit to the requirements of this measure, while his neighbor, possessed of such scruples and belonging to a religious denomination, is made exempt. If we are to exempt that class of people, fundamentally the line of division should not be drawn between those who, in addition to possessing the scruples, are members of churches and those who do not possess any affiliation with churches. Consequently, I want, as soon as this amendment is disposed of, to offer the one to which I now refer, in the hope that that invidious discrimination will be stricken from this bill.

In similar vein, he stated (*id.* at 1478):

> My amendment, however, will equalize this bill and make the exemption as extensive as the thing which it assumes to exempt whether the individual coming within the exemption belongs to a religious denomination or not.

Opposing the amendment as offering too extensive an exemption, Senator McCumber argued that "this provision practically excuses from entering into this war any American citizen who has a conscientious objection against joining the service in this war; and,

of course, it practically annihilates and destroys the whole system of compulsory service provided in the bill." 55 Cong. Rec. 1478. Senator Phelan also rejected the idea that it was necessary or desirable "to equalize all classes of citizens, those who do not belong to any society and those who do belong to societies, which for time immemorial or since their foundation, have been opposed to war." *Ibid.* He quoted from a letter to him from the presiding moderator of the California yearly meeting of the Quakers, which stated that three times each year the members of the society were aksed (*ibid.*):

> Do you maintain the Christian principle of peace and consistently refrain from bearing arms and from performing military service as incompatible with the precepts and spirit of the Gospel?

Senator Phelan emphasized that "[i]f we respect an organization of this kind that has for a long time, not in contemplation of this war or any other war, conscientiously declared its principles, it would be well for us to do it without opening the doors to every slacker who, without any sincere and long-established convictions might declare also his so-called 'conscientious scruples' in order to avoid service." *Id.* at 1478–1479.

After Senator Brady, in speaking against the amendment stated that "[t]he committee gave careful consideration to all of these matters and has presented

here a bill that is workable and fair," the amendment proposed by Senator Thomas was rejected.[20] 55 Cong. Rec. 1479. Thus, Congress in World War I continued the policy of the Civil War Congress—that of exempting only those whose adherence to principles of nonviolence derived from acceptance of the creed of religious denominations which taught that military service was forbidden.

Even though the World War I statute restricted exemptions to members of "well-recognized religious sect[s]," the Selective Service System found it impracticable to compile a list of "recognized" sects and left the matter to the discretion of the local boards. *Second Report of the Provost Marshal General to the Secretary of War on the Operations of the Selective Service System to December 20, 1918,* p. 56. As a result, some boards treated religious and non-religious objectors in the same manner, irrespective of the statute. *Report of the Provost Marshal General to the Secretary of War on the First Draft Under the Selective-Service Act, 1917,* p. 59. Finally, by Presidential regulation dated March 20, 1918, it was ordered that noncombatant service be opened to all inductees who objected to participation in war because

[20] Prior to consideration of the Thomas amendment, the Senate rejected an amendment by Senator LaFollette which would have granted exemptions "[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war." 55 Cong. Rec. 1474, 1478. The Senator admitted that the intent and effect of his proposal was to excuse those persons of German and Austrian ancestry who had "conscientious objections" against going "into the service to fight against their own kith and kin." *Id.* at 1476.

of conscientious scruples, whether or not they were certified by their local boards to be members of a religious sect or organization as defined in the act. *Second Report of the Provost Marshal General supra,* pp. 58–59. This administrative deviation represents the only occasion, so far as we can ascertain, when exemptions were granted because of non-religious opposition to war. However, unlike the present Act, the World War I statute provided for induction of objectors and excused them only from combatant service; and non-combatant service was defined to include the Medical Corps (both front line and rear zone), the Quartermaster Corps (both rear zone and in the United States), and engineer service (both rear zone, including construction of rear line fortifications, and the United States). *Ibid.*

The statutory exemption, as confined to members of "well-recognized religious sects," was held constitutional in the *Selective Draft Law Cases,* 245 U.S. 366, and subsequent decisions discussed at pp. 20–22 above. The constitutionality of the classification was specifically attacked both because it distinguished between objectors who based their views on religious convictions and those whose views came from within themselves and because it distinguished between objectors who belonged to a sect which opposed all war and not to religious objectors who did not belong to such a sect. The precedents, therefore, sustain the classification made by Section 6(j) as well as the power of Congress to seek to accommodate freedom of religion to the needs of national defense. For Section 6(j) is

more liberal than the Selective Draft Act of World War I and the classification is less subject to challenge, if it can be challenged at all, on the ground that it discriminates between religions.[30]

4. The Present Act

The exemption provision with which we are here concerned was first adopted in the Universal Military Training and Service Act of 1948. The provision, however, is an outgrowth and refinement of the one adopted in the Selective Training and Service Act of 1940, and can be understood only by tracing in detail the history of the latter statute.

The 1940 law made one radical departure from the statutes under which exemptions had been granted in the past: it abandoned the requirement that the objector belong to a sect or denomination whose creed forbade him to participate in military activities; instead, it extended the exemption to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 54 Stat 889. That change, however, entailed neither an abandonment of the concept of extending exemptions only to those who believed that they were under a religious obligation not to bear arms, nor acceptance of the premise that a merely philosophical opposition to war is sufficient to justify an exemption. The 1940 act simply shifted the emphasis from church teachings to the individual's own beliefs. Congress

[30] In our view Section 6(j) does not discriminate between religions as that term is used in the First Amendment. See pp. 73-77 below.

recognized that not every member of a sect accepts every tenet of the creed, that church members often arrive at different moral conclusions, and that many other individuals are religious without belonging to organized sects.

When the 1940 act (known as the Burke-Wadsworth bill) was first introduced, its provision relating to religious objectors duplicated the language of the World War I enactment. Hearings on S. 4164 before the Senate Committee on Military Affairs, 73d Cong., 3d Sess. 3. However, a number of witnesses—most of them representatives of church groups—appeared in favor of a broader exemption. See *Congress Looks at the Conscientious Objector* (National Service Board for Religious Objectors, 1943). Some of the witnesses were not themselves conscientious objectors, but sought to protect the interests of objectors of their own and other denominations. Their position was summed up by a non-church witness, Dr. Howard K. Beale of the American Civil Liberties Union, who testified that "[m]ost of the religious denominations have made provision for registration of conscientious objectors and have gone on record as determined to stand by the minority members of their faith whose reading of the teachings of Jesus have made them conscientious objectors to war." *Id.* at 86.

Dr. Beale inserted in the record before the Senate committee a group of resolutions and statements issued by most of the major denominations. The Reformed Church in America stated that it recognized the right of any minister or communicant "to follow the leading of his conscience before God" and the

Oxford Conference on the Church, Community, and State maintained that the church should help its members "to discover God's will" and "should then honor their conscientious decisions," whether to participate in or abstain from war. *Congress Looks at the Conscientious Objector, supra,* pp. 87, 88. The Executive Board of the United Lutheran Church in America recognized "the individual right to conscientious objection to service in a war" because "[w]e believe that the conscience of the individual, informed and inspired by the Word of God, is the final authority in determining conduct" and, while "[s]uch recognition does not imply the Church's approval of such conscientious objection," it "does proclaim its devotion and respect for the Scriptural principle of the supreme moral responsibility of the individual conscience. Acts 5:29." *Id.* at 89. The Protestant Episcopal Church requested the same status as was accorded to Quakers for those of its members who were "unwilling for conscience's sake to take human life in war" and hence "conscientiously unable to serve in the combatant forces," since "it is the duty of Christians to put the cross above the flag in any conflict of loyalties unhesitatingly to follow the Christ." *Id.* at 87. The Presbyterian Church proclaimed "adherence to the principle that Christians owe allegiance to the kingdom of God that is superior to loyalty to their own country, and that in any matter in which the laws of their country conflict with the commands of God, they must assert their duty and right to 'obey God rather than men' " and on that basis supported

those of its members "who object to war on the grounds of their religion." *Ibid.* The Disciples of Christ stated that it recognized "the right of individuals to follow their own consciences in matters of practical conduct," and, taking note that "there are within the membership of the Churches of Christ individuals who, as conscientious followers of Jesus, cannot take part as combatants in any military warfare," it requested exemption for such individuals "on the basis of this conviction of Christian faith." *Id.* at 89, 87.

In addition, representatives of various churches testified before the Senate and House committees considering the bill. The position of the Disciples of Christ was explained more fully by the Reverend James A. Crain (*Congress Looks at the Conscientious Objector, supra,* p. 83):

> May I say, as secretary of a department of social education and social action, as to the exemption of conscientious objectors, as a noncredal body it is obviously impossible for the Disciples of Christ to make refusal to do military service an article of doctrine of the church. Such would be repugnant to their ideal of freedom of individual conviction and of individual responsibility to God. The same principle, however, commits them to unqualified support and approval of those within their fellowship whose concept of their duty to God forbids them to participate in war or to take human life.

C. S. Longacre, general secretary of the Religious Liberty Association of America, representing the Seventh Day Adventists, proposed that, in addition to an

exemption for members of the historic peace churches, an exemption also extend to "any person, though a member of an organization whose creed or principles do not forbid the bearing of arms but who individually has religious scruples against the bearing of arms." *Id.* at 71.[31] The Council for Social Action of the Congregational and Christian Churches asked that there be substituted for the bill's original language an exemption for "persons whose sincere conscientious, religious beliefs, principles and convictions forbid him" to participate in War. *Id.* at 79.[32]

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[31] The proposal of the Seventh Day Adventists suggested exemption only from combatant training, but not from military service as such. *Congress Looks at the Conscientious Objector*, *supra*, p. 71.

[32] The statements of other churches were more general in that they supported accommodation for individual conscience without offering supporting justification. Thus, the General Council of Congregational and Christian Churches and the Evangelical Synod of North America merely asked that the objections of members of their denominations who had scruples against war be given the same recognition as was given to the objections of members of the historic peace churches, and the American Unitarian Association resolved merely that conscientious objection "is entirely consistent with the historic principles of the Unitarian fellowship." *Congress Looks at the Conscientious Objector*, *supra*, pp. 86, 87. The Methodist Church of America asked exemption for its communicants who had scruples against war because "conscientious objectors * * * are a natural outgrowth of the principle of good will and the Christian desire for universal peace," and the Northern Baptist Convention stated that its denomination had "always stood for the supremacy of conscience." *Ibid.* In all probability these statements were based on the same reasoning as the more specific positions taken by the other denominations.

In short, the record before the Senate and House committees considering the draft legislation was replete with statements supporting the view that each individual determines the duties that God imposes upon humans in the conduct of their lives. Exemption was requested for those, regardless of the sect to which they belonged, who, in the exercise of that responsibility, determined that their religious view forbade all participation in war. Although the churches suggested that the restriction of the exemption to members of "peace churches" be abandoned, they still viewed the purpose as the accommodation of the needs of national defense with religious freedom, *i.e.*, an exemption for those who believed themselves under an obligation to God to abjure military service.

An exchange between Senator (later Justice) Minton and Frederick J. Libby (a Quaker representing the National Council for Prevention of War), illustrates this point. After Mr. Libby stated that Quakers did not believe that there was grounds to accord them special treatment not accorded to conscientious objectors who were members of other faiths, the Senator asked if he did "not think there is a difference between that group whose conscientious objections are based upon a religious belief that they learned at their parents' knees and just some idea that he has that he does not want to serve?" *Congress Looks at the Conscientious Objector, supra,* p. 29. The witness replied that he thought "that the opposition of most young people to war is really on the

basis of its futility as a method." [33] *Ibid.* When the Senator, admitting the futility of war, suggested that the country might not have any choice as to whether it would become involved, the witness shifted his argument and stated that many non-Quaker ministers had taken the Quaker position "and there are young people who have been taught that same point of view and hold it now as firmly as the Quakers." *Ibid.* The Senator then brought up again the distinction between those who had been taught pacifism from childhood and those who merely decided for themselves that they would not fight, and the witness replied that "there are thousands and tens of thousands of young people who are just as conscientious in their rejection of the war method as they understand the Christian religion as the Quakers are." *Ibid.* He then told a general who, when asked how he could reconcile war with his Christian principles, replied that he could not and would not "pretend to take Christ with me into that war." *Id.* at 30. Mr. Libby then commented (*ibid.*):

> Now that is a very significant statement, because it confronts a young man with a choice between two great loyalties—one his loyalty to God; the other, his loyalty to his country. I do not know any other loyalties that are so compelling as those; and if a young man has to choose between them because he becomes convinced that war is wrong, as General O'Ryan was convinced, then it is irreconcilable

[33] This is one of the major grounds offered by respondent for his pacifist beliefs (R. 66).

with the teachings of Christ; then he has to decide who is supreme in his life.

And finally, when Senator Minton stated that he thought "it is a poor thing for anybody to tell the Congress of the United States that they will counsel anybody to turn their back upon their country in the hour of its need and refuse to do what the duly elected representatives of this country in Congress determine is necessary to be done in defense of the country," the witness replied that "there is a higher loyalty than loyalty to this country, loyalty to God." *Id.* at 30, 31. Thus, although this witness attempted initially to justify an exemption for those who oppose war "on the basis of its futility as a method," he rested ultimately, as did the other proponents, upon the concept that "loyalty to God" is higher than "loyalty to country."

Further indication of the intention of Congress in amending the Burke-Wadworth Act is provided by an examination of the proposals which the committees rejected. Abraham Kaufman, executive secretary of the War Resisters' League, in opposing the entire bill, said that his group rejected "not defense, but military defense," and proposed reliance upon passive resistance, as in India. *Congress Looks at the Conscientious Objector, supra,* pp. 21–23. As an alternative to rejection of the bill, he asked "[r]ecognition of the nonreligious as well as the religious objectors," stating that the former are "citizens whose point of view is closely akin to the religious conscientious objector." *Id.* at 82. Reverend Paul Schilling, chair-

man of the Committee on World Peace of the Baltimore Conference of the Methodist Church, proposed either rejection of conscription entirely or "adequate provision for all genuinely conscientious objectors to military training and service, whether their objections spring from religious, ethical, or philosophical grounds." *Id.* at 82–83. To accomplish this purpose, Reverend Schilling suggested deleting the words "by reason of religious training and belief" and extending the exemption to "any person who is conscientiously opposed to participation in war in any form." *Id.* at 83. The same phraseology was also proposed by Dr. Beale, on behalf of the American Civil Liberties Union, who stated that his organization stood for the rights of Quakers, conscientious objectors from other denominations, and "conscientious objectors on nonreligious grounds who by established membership in organizations like the Fellowship of Reconciliation can establish the sincerity of their objections." *Id.* at 85.[34]

The committees thus heard the full range of arguments in favor of an exemption for ethical and philo-

[34] However, like Frederick J. Libby, Dr. Beale in support of his argument in favor of an expanded exemption, relied upon the impasse which only the religious objector encounters (*Congress Looks at the Conscientious Objector*, *supra*, p. 85): "[m]any of the conscientious objectors will stand out against the law, will persist in putting loyalty to God above loyalty to their country's laws" and "[i]t is a terrible thing for a man of devotion and high principles who loves both his God and his country, to be told that he must choose between them."

sophical reasons in addition to religious conscience; they were presented with language designed to reach this result. By choosing the phrase "religious training and belief" Congress made plain its intent to continue the historic practice of excusing from combatant training and service and assigning to other national service only those who believe they are required by their religion, meaning their relation to a Supreme Being, not to participate in war in any form.

The Second Circuit, in *United States* v. *Kauten*, 133 F. 2d 703, misconstrued the reason for the abandonment of the requirement of membership in an historic peace church and assumed, quite contrary to the legislative history, that Congress intended to "take into account the characteristics of a skeptical generation." *Id.* at 708. From that erroneous assumption, it proceeded to the conclusion that Congress made "the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption," overlooking the fact that the Congressional committees had specifically rejected language that would have extended the exemption in terms of conscientious scruple alone and had added the modifying phrase "by reason of religious training and belief." *Ibid.* The court said that Congress intended by "religion" to include "a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the

present time the equivalent of what has always been thought a religious impulse." [35] *Ibid.*

The Ninth Circuit differed. In *Berman* v. *United States,* 156 F. 2d 377, certiorari denied, 329 U.S. 795, it noted that if it decided "that the exemption from military service written into the statute runs to all who sincerely entertain conscientious objection to participation in war * * * the phrase 'by reason of religious training and belief' would have no practical effect whatever." *Id.* at 382. Hence, it concluded that the phrase "was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one." *Id.* at 380. It reiterated this point by quoting (*id.* at 381) from the dissent of Chief Justice Hughes (with Justices Holmes, Brandeis, and Stone concurring) in *United States* v. *Macintosh,* 283 U.S. 605, 633:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.

Both the *Berman* and *Kauten* decisions were before Congress when the present statute was adopted in 1948. Congress signified that *Berman* constituted the correct interpretation of its views by adopting the

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[35] The statutory interpretation in *Kauten* was dicta, but the Second Circuit applied the interpretation in *United States ex rel. Phillips* v. *Downer*, 135 F. 2d 521, and *United States ex rel. Reel* v. *Badt*, 141 F. 2d 845, to extend the exemption to objectors with views similar to those of respondent here.

definition of "religious training and belief" which the Ninth Circuit had borrowed from *Macintosh* and saying, as to the exemption provision (S. Rep. No. 1268, 80th Cong., 2d Sess. 14):

> This section *reenacts substantially the same provisions* as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relation to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See United States v. Berman, 156 F. 2d 377, certiorari denied, 329 U.S. 795.) [Emphasis added.]

In sum, Section 6(j) is the product of a long period of evolution. Congress considered more than once, after full debate or testimony, what class should receive any special treatment accorded persons otherwise eligible for the draft who were opposed to participation in war in any form. The line of development has been remarkably consistent. The exemption, with few exceptions, has been confined to persons who belonged to religious sects opposed to war or to those whose individual religious beliefs gave them that conviction. From the day James Madison suggested that "no person religiously scrupulous shall be compelled to bear arms" (1 *Annals of Congress* 749) through the enactment of Section 6(j), there was general agreement that such an accommodation of religious freedom with national service neither created an unconstitutional discrimination nor violated the principle of separation be-

tween church and state. While long existence cannot validate an unconstitutional practice, the fact that Section 6(j) is consistent with American tradition goes far to demonstrate the reasonableness of the legislative classification and its consistency with the Constitution.

B. THE STATUTORY DEFINITION IS REASONABLY ADAPTED TO PROMOTING THE FREE EXERCISE OF RELIGION

In our view, the line drawn by Section 6(j) is substantially that between "religious" objectors, using the term "religious" as in the First Amendment, and all other pacifists. In his dissenting opinion in *United States* v. *Macintosh,* 283 U.S. 605, 633–634, Chief Justice Hughes stated:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.

The Court later approved that definition,[36] and Congress substantially adopted it in Section 6(j).

In our brief in *United States* v. *Jackson,* No. 51, this Term, pp. 18–23, we discuss at greater length the meaning of Section 6(j). It is sufficient here to say that Congress intended to cover all conscientious objectors whose opposition to war came from obligations superior to those resulting from man's relationship to his fellow man. The statute itself states that "[r]eligious training and belief * * * means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially politi-

[36] Chief Justice Hughes' views in effect became the law in *Girouard* v. *United States,* 328 U.S. 61, which overruled *Macintosh.*

cal, sociological, or philosophical views or a merely personal moral code." The expansion of the definition in Chief Justice Hughes' opinion from belief in "God" to belief in "a Supreme Being" strongly suggests that Congress was not requiring belief in any traditional concept of God, but was allowing for any form of belief based upon a superior obligation, as distinguished from a sociological, philosophical, or ethical one. Moreover, the history underlying Section 6(j) strongly supports this broad reading of the statute. At the least, this is a reasonable construction which may be adopted to avoid constitutional doubts arising from granting exemptions to persons holding one religion and not those holding another.

Relying on *United States* v. *Kauten,* 133 F. 2d 703 (C.A. 2), and *Torcaso* v. *Watkins,* 367 U.S. 488, the court below and respondent say that the statute does not allow an exemption for all who believe in religion. In *Kauten,* the Second Circuit held that the phrase "religious training and belief"—which was left undefined in the 1940 predecessor statute—included "conscience," regardless of how this conscience was formed. The court did not say, however, that religion actually included all conscientiously held philosophical views; rather, it stated that conscience "is for many persons at the present time the equivalent of what has always been thought a religious impulse." And it indicated that religion, at least in this area, lay beyond convictions based solely upon reason.[37]

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[37] The full definition in *Kauten* was (133 F. 2d at 708):

"Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in most primitive and in most highly civilized societies. It accepts the

In *Torcaso,* this Court did not define religion. Instead, it held that the First Amendment prohibits placing the authority of the State on the side of those who believe in religion and against those who do not believe in religion. As the Court stated the law (*id.* at 495):

> We repeat and again affirm that neither a state nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions against non-believers, and neither can aid these religions based on a belief in the existence of God against those religions founded on different beliefs.

At this point, the Court states in a footnote (367 U.S. at 495, note 11): "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism,

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aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. * * * Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: 'Conscience is a God to all mortals.'; impelled Socrates to obey the voice of his 'Daimon' and led Wordsworth to characterize 'Duty' as the 'Stern Daughter of the Voice of God.'

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

Taoism, Ethical Culture, Secular Humanism and others." We submit that the Court was assuming that these groups hold a belief in something beyond mere moral commitment to one's fellow man. Otherwise, all thoughtful people would be believers in religion and the Court's allusion to non-believers would include only those unwilling to take any position at all.

In our view *Torcaso* is inconsistent with *Kauten* and makes clear that religion is more than mere conscience. In *Torcaso*, the Court speaks of non-believers and of believers in religion who do not believe in the existence of God. Surely, "non-believers" does not mean people without conscience. Instead, non-believers, in the opinion as in common usage, means those people who recognize no authority above the obligation of man to his fellow man. In contrast, the Court clearly labelled as religious those who do not believe in God within the normal meaning of that word but who do believe that man has definite obligations to a force superior to himself.[38]

For the foregoing reasons, we think that the classification established by Section 6(j) includes all "religious" objectors who are seeking to follow the commands of "religion" as that term is used in the First Amendment. But whether the lines drawn by the statute coincide exactly with the meaning of "religion" in the First Amendment is immaterial. Here, Congress has made a sincere and careful effort to

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[38] See the discussion of the views of the eminent Protestant theologian, Paul Tillich, in *Jakobson* v. *United States*, 325 F. 2d 409, 415–416 (C.A. 2), pending on writ of certiorari, No. 51, this Term.

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exempt any person who is obeying his religious tenets from the necessity of choosing between defiance of the State and disobedience to the will of his particular God, however he may conceive Him. It is plain, too, that the statutory definition covers the core of "religious" objectors in the constitutional sense of religion even if there is argument about the periphery. There is room for the reasonable exercise of Congressional judgment in achieving the accommodation between freedom to obey religious obligations and the needs of national defense.

Whatever the disposition of cases in the penumbra there is a clear difference in principle between those who believe that in refusing to participate in military training or service they are following a divine command and those who conclude, on the basis of their own reasoning, that war is an improper instrument in human relations. As a matter of logic and definition, conscience and religion cannot be equated for purposes of the First Amendment. Conscience means a sense of good and evil; religion means a system of faith and worship regarding "God or a god." Webster's New Collegiate Dictionary (2d ed., 1959). On the other hand, if religion includes conscience, the First Amendment would be expanded beyond anything either the framers or this Court ever suggested. It would mean that a wide variety of governmental regulations would raise First Amendment issues whenever they happened to conflict with action taken by persons which was based on philosophical and moral views. For example, a man may have a strong philosophical belief that labor unions are evil. Surely, a free-

exercise-of-religion question is not raised if he refuses to bargain with a union in his plant."[39]

The conflict of conscience and conscription in an objector whose religion forbids his participation in war is significantly different from that of the non-religious objector. The former believes that he has no choice; he will admit that whether or not he would independently have reasoned to the conclusion that all war is wrong is immaterial since he has an unalterable obligation superior to himself. Thus, most Orthodox Jews would not have themselves decided that pork should not be eaten, yet they believe that to do so would break God's law. When the government tells such a religious man to do something which he believes God has forbidden him to do, he is faced with a conflict of authority. And he firmly believes that God, not man, is the higher authority.

On the other hand, non-religious objectors, like respondent, reach their moral positions entirely on the basis of their own reasoning. They generally look to history and their own experience to determine what is best for mankind (see R. 66, 73–76). They have no obligation to an authority outside themselves. Thus, when Congress requires that they serve in the armed forces, their dilemma is that they are forced to do

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[39] There is no doubt, and respondent does not argue to the contrary, that respondent's views do not come within the exemption as construed in the discussion above. He does not know whether God exists, believes in purely ethical principles, and opposes war entirely because of its effect on humanity (see the Statement, pp. 3–7 above). On the other hand, the government has stipulated that respondent does oppose war on the ground of conscience and therefore satisfies the definition of religion in *Kauten* (R. 49).

something which they seriously believe is wrong for mankind.

We do not minimize the seriousness of the dilemma in which the non-religious objector is placed. Quite possibly Congress might choose, as the British Parliament apparently has chosen, to exempt other conscientious pacifists in the interests of individual liberty, but the weight to be given to political, philosophical, or personal moral views in framing a universal military and training law is a legislative question. The dilemma of the non-religious objector is significantly different from the conflict of conscience of the man compelled to refuse to participate in war by his belief in a relation to a Supreme Being. Testimony before Congress repeatedly emphasized the extreme unfairness of placing religious men in that position (see pp. 65–67, 68, note 34 above). Congress had power not only to recognize the distinction but, in the penumbral area, to decide exactly where the line should be drawn in accommodating respect for religious obligations with the needs of national defense.

C. EXPERIENCE WITH THE EXEMPTION ATTESTS TO ITS REASONABLENESS

As shown in our discussion of the history of conscientious objection in this country, the line adopted by legislators has been remarkably consistent. That very consistency tends to show that the present legislative solution is essentially fair and workable. We know of nothing in recent experience to suggest the contrary.

The operation of the selective service system since Section 6(j) was enacted would also seem to indicate

that the compromise adopted by Congress has proved generally satisfactory. Peacetime conscription—a rare event in American history—has gone forward with what can certainly be described as a minimum of unrest and distress. Unquestionably, there has been widespread public acceptance. The exemption for conscientious objectors has neither resulted in an unduly large loss of manpower nor in an unduly large number of rejected claims for exemption. In the decade following the enactment of Section 6(j), a total of approximately 10,000 cases was referred to the Conscientious Objector Section of the Department of Justice. Smith and Bell, *supra*, p. 702. Of this total, approval of the claim was recommended in about 80 percent of the cases.[40] A large portion of the claims rejected reflect a determination that the applicant was not sincere. The hundreds of thousands of men called who did not claim to be objectors have apparently accepted as reasonable and just the exemption from combatant service of those opposed to war in any form because of their religious belief in their relation to a Supreme Being.

We do not contend that the successful operation of the present classification establishes that the line drawn by Congress is the ideal one. That can neither be proved nor disproved. It does appear, however, that, both from the official and the public standpoint, the law has operated successfully and with remarkably little friction. This in turn constitutes persua-

[40] Although the Department's recommendation to the Appeal Board is not binding upon the board, experience has shown that these recommendations are followed with very infrequent exception.

sive evidence that Congress has made an allowable judgment.

The fact of widespread public acceptance is one of particular significance in this area. Those who serve in the armed forces do so at no small sacrifice. Some may need no urging to serve their country in its hours of crisis. For many, however, the duty to serve in that demanding and dangerous capacity is rendered considerably more tolerable by the knowledge that it is a well nigh universal obligation in which they are called upon to share. Thus, an exemption which would broadly excuse from combatant service all of those who sincerely dislike or oppose the idea of war would not only threaten to deplete the available source of manpower; it would also tend to cause disaffection, perhaps on a very serious scale, among those who remain to shoulder the burden. Congress is thus called upon to strike a delicate balance—to accord a measure of relief to those whose situation appeals most compellingly to the instincts of toleration and compassion, yet to stop short of exemptions so broad or so numerous as to undermine confidence in the concept of universal service.

D. THE DISTINCTION DRAWN BY SECTION 6(j) BETWEEN A RELIGIOUS OBLIGATION TO A SUPREME BEING AND A POLITICAL OR PHILOSOPHICAL CONVICTION OR A PERSONAL MORAL CODE CONFORMS TO THE RELIGIOUS TRADITIONS OF THE AMERICAN PEOPLE

The widespread public acceptance of the exemption for conscientious objectors as classified in the present selective service system is no doubt due largely to the fact that the definition of "religious training and belief" in Section 6(j) is in keeping with the ideals and traditions of the American people. Their religious

character has been repeatedly noted in the opinions of this Court. In *Abington School District* v. *Schempp,* 374 U.S. 203, 213, the Court reiterated the specific recognition it had given to this fact in *Zorach* v. *Clauson,* 343 U.S. 306, 313:

> We are a religious people whose institutions presuppose a Supreme Being.

Chief Justice Hughes, dissenting in *United States* v. *Macintosh,* 283 U.S. 605, 633–634, stated the understanding of religion shared by the great majority of the American people:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis* v. *Beason,* 133 U.S. 333, 342: "The term 'religion' has reference to one's views on his relations to his Creator, and to the obligations they impose of reference for his being and character, and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.

No court today is likely to repeat in a literal way the assertion that, "We are a Christian people," but there is scant dissent from the proposition that we are a people "according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God." *United States* v. *Macintosh, supra,* 283 U.S. at 625.

This widely-held consensus of opinion would not support aid to religion or discrimination against non-

believers. Compare *Engel* v. *Vitale*, 370 U.S. 421; *Abington School District* v. *Schempp*, 374 U.S. 203. But the consensus is relevant in defining the class of those exempted from combatant duty and assigned to other national service, provided that the government may seek to accommodate the needs of national defense with the free exercise of religion, as we have contended. For, as Mr. Justice Brennan pointed out in *Abington School District* v. *Schempp*, 374 U.S. 203, 295, nothing in the Constitution compels the government to blind itself to religious beliefs in the application of legislation for purely secular ends where the effort is to alleviate burdens upon the free exercise of each citizen's religion.

In determining whom to assign to noncombatant national service because of conscientious opposition to participation in war in any form, Congress had strong reason to take into account the deep-seated convictions of the American people. The scope of the exemption from military service accorded to "conscientious objectors" is a matter of concern not only to those who qualify and those who might desire an exempt status that Congress denied them; it also affects all other men—and also their families—when called for military training or service. It is one thing for a man to be called upon for the same service to which all whom he feels are similarly situated are also subject; it is another to be called to serve—or to have one's son or husband summoned—when others have been excused who were widely regarded as fairly subject to the same obligation.

The line drawn by Congress has its roots in the beliefs of the men and women affected by the draft. Whatever nice distinctions must be drawn in its application, the great bulk of the people affected would find the governing principle in section 6(j) both understandable and fair—more understandable and fairer, we suspect, than any other that might be developed. Since their response bears upon the workability of the law and thus upon its secular objectives, the conformance of the distinction to our religious tradition goes far to demonstrate the reasonableness of the classification.

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